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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE BOARD OF TRUSTEES OF THE CEMENT MASONS SOUTHERN CALIFORNIA PENSION TRUST, Plaintiff - Appellant, v. CUTLER & COMPANY, LLC, a California limited liability company, Defendant-cross-claimant, and ROBERT W. LAMBERTI, an individual; MICHAEL K. WEST, an individual, Defendants-cross-claimants - Appellees.	No. 04-56096 D.C. No. CV-03-05911-R **MEMORANDUM** [*]

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted April 6, 2006[**]

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: **SKOPIL**, **BOOCHEVER**, and **LEAVY**, Circuit Judges.

The Board of Trustees of the Cement Masons Southern California Pension Trust ("Board") appeals the district court's grant of summary judgment in favor of two employees of Cutler & Company ("Cutler") on claims the employees committed fraud and made negligent misrepresentations. The Board also appeals the district court's refusal to permit an amended complaint to allege the employees violated their fudiciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). We affirm.

DISCUSSION

In April 2000, the Board interviewed several investment firms in hopes of hiring one to manage part of its pension trust fund. During Cutler's presentation, a trustee inquired whether Cutler would be able to follow investment guidelines. The Cutler employees responded that Cutler would be able to do so. Thereafter, the Board and Cutler negotiated and executed an Investment Agreement, including an addendum stating that "[n]o more than 5% of the equity portfolio may be invested in one equity security at cost."

Following the substantial market declines in 2001 and 2002, the Board charged that Cutler failed to adhere to the "5%" rule and thus caused greater losses to the pension trust than would have occurred if the rule had been followed. The

Board filed this action, alleging Cutler was negligent, breached its fudiciary duties under ERISA, and violated the investment agreement by not adhering to the 5% rule. Those claims were dismissed without prejudice when Cutler filed for bankruptcy. At issue here is whether the two Cutler employees committed fraud and made negligent misrepresentations by stating that Cutler would follow investment guidelines. The district court granted summary judgment, ruling the Board failed to raise triable issues regarding scienter and reasonable reliance.

We agree with the district court's ruling.[1] It is undisputed that the investment guidelines were not provided to the employees prior to or at their presentation. It is also undisputed that the trustees did not discuss the specific terms of the diversification provision at the meeting, but rather asked in general terms if Cutler would follow investment guidelines. Thus, the employees had no reasonable ground to believe their statement was false. Similarly, the fact the Board knew that the employees did not possess the guidelines and could therefore

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[1] The Board complains that the district court's written decision was drafted by opposing counsel and goes beyond the court's oral explanation. We do not, however, prohibit a district judge from adopting an order drafted by counsel. See Living Designs, Inc. v. E.I. Dupont De Nemours, 431 F.3d 353, 373 (9th Cir. 2005), cert. denied, 2006 WL 565509 (U.S. June 12, 2006). Moreover, when there is conflict between an oral ruling and subsequent written decision, we will review the written one. See Playmakers LLC v. ESPN, Inc., 376 F.3d 894, 896 (9th Cir. 2004); Ellison v. Shell Oil Co., 882 F.2d 349, 352 (9th Cir. 1989).

not address the specific diversification provision precludes a finding of reasonable reliance. Without triable issues of fact as to scienter and reliance, the court properly granted summary judgment on the claims of fraud and misrepresentation. See United States v. Kitsap Physicians Serv., 314 F.3d 995, 1000-01 (9th Cir. 2002) (noting the failure to raise a triable issue of fact as to any essential element of a claim justifies summary judgment); see also General Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993) (affirming summary judgment on fraud and negligent misrepresentation claims).

Finally, we conclude the district court did not abuse its discretion in denying the Board's motion to file an amended complaint. First, the motion was made long after the close of discovery and after summary judgment motions were filed. See Swanson v. U.S. Forest Service, 87 F.3d 339, 345 (9th Cir. 1996) (affirming denial of late motion to amend). Second, the Board does not argue the claims could not have been asserted in the original complaint. See Chodos v. West Publishing Co., 292 F.3d 992, 1003 (9th Cir. 2002) (affirming denial of motion to amend when new claim could have been alleged in prior complaint).

AFFIRMED.